No. 03-362

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, Petitioner

v.

LAWRENCE S. BITTAKER, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(CAPITAL CASE)

1. Does a district court exceed its well-settled authority to control the dissemination of discovery materials it orders produced in a federal habeas action pending before that court by issuing an appropriately limited protective order?

2. Should certiorari be granted to review a protective order when the Petitioner has suffered no cognizable harm in any proceeding and when the federal habeas proceeding in which the protective order was granted remains pending ?

LIST OF PARTIES

The parties to this action are Petitioner Warden Jeanne Woodford ("the Warden") and Respondent Lawrence Bittaker ("Mr. Bittaker"). The State of California is not a party to this action, at the insistence of counsel for the State, whose motion to have the State dismissed was granted. *See* Respondent's Appendix A & B.

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OPINION OR JUDGMENT BELOW AND STATEMENT OF JURISDICTION

Respondent, Mr. Bittaker, does not object to the Warden's statement of the opinion below or statement of jurisdiction.

STATUTORY PROVISIONS

In addition to 28 U.S.C. § 2254, cited by the Warden, relevant statutory and rule provisions also include Rule 6 of the Rules Governing Section 2254 Cases in the United States District Court (hereinafter "Habeas Rules"), which provides:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

And Rule 26(c) of the Federal Rules of Civil Procedure, which states:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the disclosure or discovery not be had;
>
> (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court;
>
> (6) that a deposition, after being sealed, be opened only by order of the court;
>
> (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
>
> (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

STATEMENT OF THE CASE

This is a capital habeas action brought under 28 U.S.C. § 2254. In the course of litigating the claims in Mr. Bittaker's habeas petition, the parties sought discovery pursuant to Habeas Rule 6. The Warden sought production of the entire file of Mr. Bittaker's trial counsel, and also sought to depose Mr. Bittaker and members of his defense team. Mr. Bittaker did not oppose the Warden's request, but asked the District Court to issue a protective order under Federal Rule of Civil Procedure 26(c) limiting the use of this material to the litigation of the claims in the habeas petition.

On May 10, 2002, the District Court issued a protective order as requested by Mr. Bittaker.[1] On May 15, 2002, the Warden filed a Notice of Appeal, contending that this protective order was

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[1] The text of the protective order in its entirety is as follows:

> "All discovery granted to respondent pursuant to respondent's motion to discover trial counsels' files and conduct depositions of trial counsel, petitioner's defense team and petitioner, shall be deemed to be confidential. These documents and material (hereafter "documents") may be used only by representatives from the Office of the California Attorney General and only for purposes of any proceedings incident to litigating the claims presented in the petition for writ of habeas corpus pending before this Court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons or agencies, including any other law enforcement or prosecutorial personnel or agencies, without an order from this Court. This order shall continue in effect after the conclusion of the habeas corpus proceedings and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case, except that either party maintains the right to request modification or vacation of this order upon entry of final judgment in this matter.
>
> This Court recognizes that Respondent objects to entry of this protective order, and that Petitioner contends the required disclosures in this action do not constitute a waiver of his rights under the 5th and 6th Amendment in event of any retrial. This Court may vacate the order at any time. The parties will advise the Court of any future rulings in *Osband v. Woodford*."

See Appendix A to the Petition for Writ of Certiorari at A-3 to A-4, n.1 (hereinafter cited as "Warden's Appendix").

a collateral order subject to immediate appeal. Mr. Bittaker did not contest the collateral nature of the appeal. On May 23, 2003, the Warden filed a motion with the Court of Appeals under Federal Rule of Appellate Procedure 35, requesting to have the case heard en banc in the first instance. The Court of Appeals granted this request.

A unanimous en banc panel of the Court of Appeals affirmed the District Court's protective order on June 6, 2003. The en banc court concluded that the District Court properly issued the protective order governing the production of trial counsel files in a federal habeas action. The Court of Appeals held that the order struck the appropriate "delicate balance between the interests of the state and those of the federal government" in habeas proceedings, by "preserving the state's vital interest in safeguarding the attorney-client privilege in criminal cases," while allowing the Warden to fully litigate Mr. Bittaker's claims, yet still ensuring that Mr. Bittaker could "obtain[] a fair adjudication of his petition and secur[e] a retrial untainted by constitutional errors." *Bittaker v. Woodford*, 331 F.3d 715, 721-22 (9th Cir. 2003); Warden's Appendix at A-11 & A-13.[2]

REASONS FOR DENYING THE WRIT

Through his certiorari petition, the Warden seeks review of the Court of Appeals' affirmance of a district court's discovery order that fell well within the District Court's discretion under settled principles of law. In this context, the Warden's petition is a singularly inappropriate candidate for certiorari. As described in more detail below, the unanimous en banc opinion in *Bittaker v. Woodford* does not present issues of sufficient importance to merit certiorari.

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[2] For ease of reference, Mr. Bittaker will cite to the Warden's Appendix for page references to the Court of Appeals' opinion.

First, this Court does not need to grant certiorari to review the unremarkable proposition that Federal Rule of Civil Procedure 26(c) grants a district court the authority to issue a protective order governing documents subject to the attorney-client privilege and the work product doctrine,[3] which documents the District Court ordered be produced solely to allow the parties to litigate claims in a federal habeas petition. Second, the *Bittaker v. Woodford* decision does not create a conflict with the decisions of other Courts of Appeals regarding the scope of an implied waiver of the attorney-client privilege, particularly because no other Court of Appeal has specifically addressed the proper scope of a protective order in a federal habeas case where the petitioner is alleging ineffective assistance of counsel. Finally, the Court of Appeals' reasoning on this issue is irrelevant to the outcome of the merits of this case, and the Warden has been unable to articulate any prejudice or limitation in her ability to pursue the litigation as a result of the protective order.

For all of these reasons, the Warden's certiorari petition should be denied.

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[3] The Court of Appeals' decision was based upon both privileges: "Although our decision is couched in terms of the attorney-client privilege, it applies equally to the work product privilege..." Warden's Appendix at A-12 to A-23. n.6. Mr. Bittaker's discussion of both privileges will also be encompassed by the use of the term "attorney-client privilege" or "privilege."

ARGUMENT

I.

The Court of Appeals' Decision Is In Harmony With Well-Established Principles Of Law And Does Not Merit Certiorari Because It Neither Exceeds The Authority Of The District Court Nor Impermissibly Interferes With Any State Court Action.

The Warden argues that the decision by the Court of Appeals interferes with the prerogatives of a state court, both exceeding the District Court's authority under 28 U.S.C. § 2254, and violating the principles of federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. The Warden is mistaken. The unanimous Court of Appeals' decision properly affirms the scope of a district court's authority to control discovery pending before that court, including the power of a district court to prevent one party to an action (the Warden) from using the broad civil discovery procedures allowed in federal court to help a non-party to the action (various prosecutorial agencies) gain an advantage in criminal proceedings that might be brought in another court in the future. Further, the decision does not impermissibly interfere with any current or future state court proceedings.

A. The Decision Does Not Exceed the Authority of the District Court.

The authority of the District Court to control discovery in pending actions, including by issuing a protective order, and the power of the Court of Appeals to affirm that action is governed by Habeas Rule 6,[4] F.R.Civ.P. 26(c), and this Court's decisions.

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[4] Even before Rule 6 existed, this Court noted that the "All Writs Act, 28 U.S.C. § 1651, gave federal courts the power to 'fashion appropriate modes of procedure,' . . . including discovery, to dispose of habeas petitions' as law and justice require[.]" *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), *quoting Harris v. Nelson*, 394 U.S. 286, 299 & 300 (1969).

Habeas Rule 6 provides that:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

One of the processes of discovery available under the Federal Rules of Civil Procedure is a Rule 26(c) protective order. This Court has recognized that a district court's discretion to fashion orders under Rule 26(c) is quite broad:

> To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984).

This Court also has expressly approved using a F.R.Civ.P. 26(c) protective order to prevent one party from using the broad civil discovery available in federal court to obtain an advantage in a criminal case:

> [T]he District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Fed. Rule Civ. Proc. 26(c). Decisions in the Courts of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases. *See, e.g., In re Ramu Corp.*, 903 F.2d 312, 316-317, 320- 321 (C.A.5 1990); *United States v. Stewart*, 872 F.2d 957, 962-963 (C.A.10 1989); *Campbell v. Eastland*, [307 F.2d 478 (C.A.5 1962)] at 487. *See also Capital Engineering & Mfg. Co., Inc. v. Weinberger*, 695 F. Supp. 36, 41-42 (D.C.1988); *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380-381 (D.C.1977).

Degen v. United States, 517 U.S. 820, 826-827 (1996). The Court of Appeals recognized this concern as one of the bases justifying the protective order in this matter. Warden's Appendix at A-14 to A-15 & A-19.

B. The Warden's Authorities Do Not Support Her Contention That the Decision Exceeds the Authority of the District Court.

The Warden does not address any of the applicable authorities regarding a district court's broad discretion to control discovery and issue protective orders. Instead, the Warden argues that the District Court's issuance of the protective order, and the Court of Appeals' affirmance of that order, exceeds the authority of these courts under 28 U.S.C. § 2254 and *Pitchess v. Davis*, 421 U.S. 482 (1975). The Warden's argument is best summarized as contending that the protective order amounts to an order dictating the type of evidence that can be introduced at any retrial, and is therefore an impermissible interference on the state court.

The first problem with the Warden's argument is that her authorities do not support this contention. Instead, the Warden's authorities stand for the proposition that if a petitioner is granted relief under § 2254, and he is retried for the same offense, a district court cannot interfere in the state court action until the new trial is completed and the petitioner has exhausted all of his state court remedies. *Pitchess v. Davis*, 421 U.S. at 490. Mr. Bittaker has not yet obtained relief, he is not being retried, and he is not asking the District Court to interfere with any retrial.

The second problem with the Warden's argument is that nothing in the protective order, or the Court of Appeals' decision, precludes any law enforcement agency from seeking to obtain, and introduce, the same material in a state court. As the Court of Appeals stated:

> The courts of California remain free, of course, to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation. In addition, if the district attorney is able to obtain the privileged materials through a source other than the Attorney General's office, he would be free to present them to the state court and seek a ruling on their admissibility. The district court's order simply precludes a party before it

> from misusing materials it obtained for a limited purpose by invoking the court's power of compulsion. We are confident that the state courts will not feel in the least uncomfortable because a party may not use confidential information it secured by invoking our power and authority, just as we would respect a similar order limiting the use of privileged materials obtained during the course of state court litigation. This is comity, not encroachment.

Warden's Appendix, at A-20 to A-21 (emphasis in original).

As this Court has recognized, a district court retains the authority to control any material produced pursuant to an F.R.Civ.P. 26(c) protective order. *See Seattle Times Co. v. Rhinehart*, 467 U.S. at 32-33; *Degen v. United States*, 517 U.S. at 826; *E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917) ("It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made"). This continuing impact does not exceed the authority of a district court, and is not an impermissible interference with any other court.

C. The Decision Does Not Impermissibly Interfere With any State Court Proceeding.

The very nature of federal habeas proceedings involves some interference with state court criminal proceedings. From the statutory authorization to enjoin state court proceedings by issuing a stay of execution, to the ability to grant relief from a state court conviction or sentence, the Great Writ is an interference with state court criminal actions. *See* 28 U.S.C. § 2251 *et. seq.*; *McFarland v. Scott*, 512 U.S. 849, 857 (1994); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 516 (1982) ("[t]he federal writ of habeas corpus, represent[s] . . . a profound interference with state judicial systems and the finality of state decisions"). However, the decision in *Bittaker v. Woodford* does not extend this interference in any impermissible manner.

First, the decision does not interfere with any current state court proceeding for the simple reason that there are no proceedings involving Mr. Bittaker currently pending in any state court. When this Court decided *Younger v. Harris*, this Court held that a federal court should neither "stay [n]or enjoin pending state court proceedings except under special circumstances." 471 U.S. at 41. The requirement for *pending* state court proceedings is axiomatic to *Younger*, and every decision cited by the Warden on this issue, involved a federal court's interference in currently pending state court litigation. *See Perez v. Ledesma*, 401 U.S. 82, 84 (1971) (the decision "effectively stifle[d] the *then-pending* state criminal prosecution") (emphasis added); *Kugler v. Helfant*, 421 U.S. 117, 119 (1975) (request to enjoin state offices from "proceeding with the prosecution of an indictment *pending* against" the defendant) (emphasis added); and *Stefanelli v. Mindard*, 342 U.S. 117, 118 (1951) (request to preclude use of a evidence in an upcoming criminal trial). Without pending state court proceedings, there is no violation of *Younger* or this Court's concerns regarding federalism.

Second, the decision does not impermissibly interfere with any possible future state court proceedings. The protective order applies only to the Warden, who would not be a party at any retrial. The Court of Appeals specifically recognized that the prosecuting agencies – who are not parties in this habeas action but would be parties in a retrial – could seek production of the same materials before a state court under state law. Warden's Appendix at A-20 to A-21. As of yet, the prosecution agencies have not sought production of this material before any state court.

Therefore, as the Warden acknowledges, there is a distinct problem with ripeness on this issue under *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) and *Asarco Inc. v. Kadish*, 490 U.S. 605, 375-76 (1989). Cert. Petition at 7-8 n.3. Until some prosecution agency actually seeks production of this material in a state court proceeding, there is absolutely no way to

know how the state court would rule on these issues, and no way for this Court to determine if there has been any improper interference with a state court action.[5]

D. A Grant of Certiorari is Not Warranted.

The District Court's issuance of the protective order governing the production of material in federal court, and the decision of the Court of Appeals recognizing the appropriateness of that order, are unremarkable. This is a routine discovery issue, and does not involve an important question of federal law. Further, nothing about the District Court's action or the Court of Appeals' decision conflicts with relevant decisions of this Court. Accordingly, certiorari is not warranted. Rules of the Supreme Court of the United States, Rule 10.

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[5] The Warden also cites *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring), which discusses Justice Thomas' analysis of Supremacy Clause, and not any holding of this Court. The Warden also cites a California Supreme Court's decision noting that the court was "not bound by the decisions of the lower federal courts even on federal questions [although] . . . they are persuasive and entitled to great weight." *People v. Bradley*, 1 Cal. 3d 80, 86 (Cal. 1969). A decision by the California Supreme Court is not at issue in the petition. However, the Court of Appeals noted that:

> [T]he California Supreme Court, during the course of a state habeas proceeding, entered an order very similar to the one here. While the order is not published, and therefore presumably not binding in future cases, it does seem to strike the same balance among the competing interests as we do. Significantly, the order specifically bars the use of privileged materials at petitioner's possible retrial.

Warden's Appendix at A-16 to A-17 (footnotes omitted). That order is discussed in more detail, *infra*.

II.

The Court Of Appeals' Resolution Of The Scope Of The Waiver Of The Attorney-Client Privilege In A Federal Habeas Corpus Case Where The Petitioner Is Alleging Ineffective Assistance Of Counsel Does Not Merit Certiorari.

A. The Decision of the Court Below is Correct and in Harmony with Well-Established Principles of Law.

The en banc Court of Appeals' unanimous resolution of the nature and scope of Mr. Bittaker's waiver of the attorney-client privilege is also an unexceptional application of well-settled principles of law.

The Court of Appeals identified and analyzed the two types of waivers of the attorney-client privilege. First, there is the "express waiver" which is accomplished through the actions, even if inadvertent, of the attorney or the client. Warden's Appendix at A-8 fn. 4. The second type of waiver, the "implied waiver," is accomplished through the assertion of a claim by a client, which puts the lawyer's performance at issue during the litigation. *Id.* This rule stems from what the courts have called the fairness principle. *Id.* at A-7. The concept of an implied waiver dates back to 1888, when this Court decided *Hunt v. Blackburn*, 128 U.S. 464 (1888) ("When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford [her lawyer], and respecting which she testified, she waived her right to object to his giving his own account of the matter."). *Id.* at 470-471; *United States v. Amlani*, 169 F.3d 1189, 1196 (9th Cir. 1999).

In this case, Mr. Bittaker has asserted a claim of ineffective assistance of counsel, which compels an implied waiver of the attorney-client privilege in order to properly resolve the facts hidden behind the privilege. "The privilege which protects attorney-client communications may not

be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.1992); *In re Sealed Case*, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982).

Further, the Court of Appeals applied the fairness principle to determine that the waiver by claim assertion ". . . must be no broader than needed to ensure the fairness of the proceedings before it. Because a waiver is required so as to be fair to the opposing side, the rationale only supports a waiver broad enough to serve that purpose." Warden's Appendix at A-10. The Court of Appeals, in keeping with other courts on this question, reasoned that the scope of such waivers must be limited to that proceeding and tailored closely to the needs of the opposing party in order to fairly litigate the claim. *Id., and see Kerr v. United States District Court*, 426 U.S. 394, 405 (1976) (recognizing the need to ensure that the "balance between petitioner's claim [ ] of . . . privilege and the plaintiffs' asserted need for the documents is correctly struck"); *Newburyport Clamshell Alliance v. Pub. Serv. Co.*, 838 F.2d 12, 22 (1st Cir. 1988) (holding that the client need reveal only information "for which defendants have so far shown a true need and without which they may be unfairly prejudiced in their defense"); *Amlani*, 169 F.3d at 1196 ("only those documents or portions of documents relating to the [claim asserted by the client] [should be] disclosed").

In deciding the scope of the waiver in the federal habeas context, the Court of Appeals struck "a delicate balance between the interests of the state and those of the federal government." Warden's Appendix at A-11; *see Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring). Balancing the state-created attorney-client privilege and the state prisoner's federal statutory right for collateral review of their convictions in federal court under 28 U.S.C. § 2254, the Court of Appeals decided to impose a narrow waiver rule. *Id. at* A-11 to A-12. The Court of Appeals reasoned that a broad waiver rule would inhibit frank attorney-client communications and would

cause the attorney to worry about whether their case files or communications would someday be made available to the prosecution. *Id.* at A-12. In balancing the state prisoner's federal statutory right to file a habeas petition and to receive a fair adjudication thereof and the state's interest in promoting the ethical obligations underlying the attorney-client privilege, the Court of Appeals held that:

> If [Bittaker] succeeds on any of these claims, it will mean that his trial was constitutionally defective. Extending the waiver to cover Bittaker's retrial would immediately and perversely skew the second trial in the prosecutions' favor by handing to the state all of the information in petitioner's first counsel's case file. If a prisoner is successful in persuading a federal court to grant the writ, the court should aim to restore him to the position that he would have occupied, had the first trial been constitutionally error-free.

Warden's Appendix at A-13.

The unanimous Court of Appeals correctly applied well-settled principles of law to determine that Mr. Bittaker's case involves an implied waiver of the attorney-client privilege and the Court of Appeals appropriately determined the scope of the waiver. Accordingly, that decision does not merit review by this Court. Rules of the Supreme Court of the United States, Rule 10.

B. There is No Clear Conflict Among the Courts of Appeals on These Issues.

The Warden does not recognize the concept of different types of waivers, and refuses to accept that an implied waiver is different from an express waiver. Instead, the Warden attempts to create a conflict among the Courts of Appeals by arguing that several courts have rejected the notion of what she terms a "selective waiver," and "instead have held that a waiver of the attorney-client privilege, however accomplished, is complete and permanent, and not subject to limitations." Cert. Petition at 14.

First, the Warden misstates the law. Contrary to the Warden's contention that most courts follow the rule that once a waiver is made it is complete and permanent, many courts have found either an exception or a limitation of the waiver even in express waiver cases. *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (finding an exception to the waiver of the privilege when the disclosure is "inadvertent"); *KL Group v. Case, Day & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987) (same); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (same); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 n.1, 611 (8th Cir. 1977) (en banc) (voluntary disclosure of information to the SEC resulted only in a limited waiver and that information remained privileged in subsequent private litigation); *In re von Bulow*, 828 F.2d, 103 (2d Cir. 1987) ("[W]here . . . disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed."). In reality, any differences among the courts in resolving these waiver issues is in keeping with this Court's notation in *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981), that adjudications of the attorney-client privilege must be done on a case-by-case basis. *Upjohn*, 449 U.S. at 386; *see also In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (declining to adopt a per se rule that all voluntary disclosures to the government waives work product protection).

Second, the allegedly conflicting decisions are distinguishable from Mr. Bittaker's case on both the law and the facts. Seven of the cases that the Warden cites from the First, Second, Third, Fourth, Eighth, D.C. and Federal Circuits do not involve the situation presented here: an implied waiver or waiver by claim assertion. Instead, these cases involve express waivers of the attorney-client privilege or the work-product privilege. Six of these cases are both legally and factually distinct from Mr. Bittaker's, because they involve express waivers accomplished when a corporate

entity disclosed privileged documents to a governmental agency pursuant to a subpoena or voluntarily produced documents in order to cooperate with an investigation instigated by a governmental agency. *Permian Corporation v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (disclosure of documents to SEC could not prevent later disclosure of the same documents to the Department of Energy); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (previous disclosure to the United States Attorney and Department of Defense waived attorney-client privilege and company employee facing indictment was entitled to the documents); *United States v. Mass. Inst. of Technology*, 129 F.3d 681 (1st Cir. 1997) (contractor's voluntary disclosure of documents to the Defense Contract Audit Agency of the Department of Defense forfeited any attorney-client privilege covering the documents subject to an IRS summons); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991) (voluntary disclosure of to the SEC and DOJ during investigations by those agencies waived attorney-client privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) (voluntary disclosure to the SEC waived work product protection in this case).

Even the case cited by the Warden as being the only one "in line" with the Ninth Circuit's decision in this case, *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), is distinguishable on the same grounds. Diversified made a voluntary disclosure of documents to the SEC during a non-public investigation. In a later lawsuit, a party requested those same documents contending that the production to the SEC (and to a law firm employed by Diversified), constituted a waiver of the privilege. An en banc panel of the Eighth Circuit held that the disclosure to the SEC constituted a limited waiver of the privilege. Thus, the allegedly conflicting United States Courts of Appeals decisions cited by the Warden are distinguishable, because they involved neither a habeas

corpus proceeding nor an implied waiver through assertion of an ineffective assistance of counsel claim.[6]

As opposed to all of these cases, Mr. Bittaker did not make an express waiver of the privilege and his status as an indigent state prisoner is certainly different from that of a corporate entity. None of the parties in the United States Courts of Appeals cases cited by the Warden were state prisoners asserting that their constitutional right to effective assistance of counsel had been violated. Such a distinction is important. As Judge Kozinski wrote for the Court of Appeals in this case:

> [R]equiring the petitioner to enter such a broad waiver would force him to the painful choice of, on the one hand, asserting his ineffective assistance claim and risking a trial where the prosecution can use against him every statement he made to his first lawyer and, on the other hand, retaining the privilege but giving up his ineffective assistance claim. This would violate the spirit, and perhaps the letter, of *Simmons v. United States*, 390 U.S. 377, 394 (1968) (footnote omitted). It is no answer to say that Bittaker created this dilemma for himself -- that he was the one who voluntarily "chose" to challenge his conviction on grounds of ineffective assistance. The Constitution guarantees Bittaker the right to effective assistance of counsel at trial, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and Congress has provided him an avenue to claim that his constitutional rights were violated, 28 U.S.C.§ 2254. As one of our sister circuits has recognized in a different context, one may be "a 'voluntary' party only because there is no other means of protecting legal rights . . . . The scope of required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [one's] constitutional right[s]." *Greater Newburyport Clamshell Alliance*, 838 F.2d at 21-22.

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[6] In another case cited by the Warden, *Genetech, Inc. v. United States Internal Trade Commission*, 122 F.3d 1409 (Fed. Cir. 1997), although a protective order was in place, the privilege-holder inadvertently released privileged documents. The court held that the protective order did not prevent a waiver because the disclosure was the result of an inadequate screening process. *Id.* at 1418. The waiver in *Genetech* was therefore an express waiver and the United States Internal Trade Commission could obtain those documents. In Mr. Bittaker's case, it is appropriate to impose a limitation on waiver in a situation where the court has ordered disclosure because of his assertion of a claim. This is especially true here when, as opposed to the party in *Genetech*, Mr. Bittaker took all reasonable steps to carefully ensure that the scope of the waiver was clearly defined before the information was disclosed. *See* footnote 1.

Warden's Appendix at 14-16.

There is simply no conflict among the U.S. courts of appeals on the issue of the scope of a habeas corpus petitioner's waiver of the attorney-client privilege in the federal habeas corpus claim assertion context. As the Court of Appeals in this case correctly points out in its opinion, there are not many cases like the one at bar "except for a small handful originating in California, *see Osband*, 290 F.3d at 1042-43; *Anderson*, 232 F.3d at 1099-100; *McDowell v. Calderon*, 197 F.3d 1253, 1255-56 (9th Cir. 1999) (en banc) (per curiam)." Warden's Appendix at 21. As the Court of Appeals in this case identified, the closest United States Courts of Appeals case that "even remotely raises" the same issue is *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987). Id. In that case, after a defendant sought to withdraw his guilty plea by asserting that his attorney gave him incompetent advice, the attorney testified at the evidentiary hearing on the matter. The defendant expressly waived the attorney-client privilege at the hearing and did not preserve for appeal what the court deemed the "interesting" issue regarding the *Simmons* argument. *Id.* at 1161.

No other U.S. Court of Appeals has considered the issue regarding the attempted use by the prosecution of privileged information obtained as a result of federal discovery procedures at a defendant's retrial. However, several state supreme courts have analyzed the issue with respect to discovery obtained through state habeas proceedings, and all reached the same resolution as the Court of Appeals in this case.

In *In re Gallego*, the California Supreme Court issued an unpublished protective order of attorney's files in a habeas corpus case disallowing the respondent from using the documents or any information contained therein against the petitioner during any future proceeding, including a retrial. *See* Warden's Appendix at A-16 n.8. Additionally, two other state courts of last resort, the Supreme

Courts of Pennsylvania and Georgia, have specifically addressed this issue and have reached the same conclusion as the Court of Appeals did in Mr. Bittaker's case. In *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000), the Supreme Court of Georgia held that by bringing an ineffective assistance of counsel claim, a state prisoner impliedly waived the attorney-client privilege and the attorney work-product doctrine, but that a protective order was appropriate to limit the scope of such waiver to the persons needed to assist in rebutting the claim of ineffectiveness. *Waldrip*, 272 Ga. at 573. And, in *Commonwealth v. Chmeil*, 558 Pa. 478, 511, 738 A.2d 406 (1999), the Pennsylvania Supreme Court spoke to the difficult situation where a criminal defendant may choose not to seek to enforce the effective representation of counsel to which he is entitled because he fears that the price of success on habeas review will be his compelled self-incrimination, through the testimony of prior counsel, upon retrial. *Commonwealth*, 558 Pa. at 508-509. The Pennsylvania Supreme Court held that:

> The policy inherent . . . [in] judicial enforcement of the attorney-client privilege, as it implicates a defendant's exercise of the right to the effective assistance of counsel and to freedom from compelled self-incrimination, restricts the use as well as the scope of permitted disclosures. Just as an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations, so the client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges.

Commonwealth, 558 Pa. at 511. Thus, three state supreme courts have found that the implied waiver of the attorney-client privilege by a habeas petitioner's assertion of an ineffective assistance of counsel claim is limited in scope to that habeas proceeding.[7]

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[7] To the best of Mr. Bittaker's knowledge, the only other case addressing waiver of rights in the habeas corpus context is a case arising out of a Court of Appeals in the state of Missouri. That court also held in line with the Court of Appeals' decision in Mr. Bittaker's case. *State v. Samuels*, (continued...)

The Court of Appeals' opinion does not present a conflict with a decision of any other Court of Appeals, and its reasoning is in line with three opinions issued by state courts of last resort. Thus, the issue does not present this Court with the criteria required for review set forth in the Rules of the United States Supreme Court, Rule 10(a).

III.

The Ruling Of The Court Of Appeals Is Irrelevant To The Outcome Of This Case.

Even where conflict exists in the circuits, "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of a case before the Court, certiorari may be denied." ROBERT L. STERN, EUGENE GRESSMAN, STEVEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE, § 4.4 at 231 (8th Ed. 2002).

The resolution of the protective order issue in this case is completely irrelevant to the substantive merits of the litigation. A decision on the merits of Mr. Bittaker's habeas claims has not yet been reached by the District Court, and, even when the merits are reached, the outcome will not be affected by the protective order. The practical effect of the Court of Appeals' decision on the scope of Mr. Bittaker's waiver of the attorney-client privilege will not be known unless and until Mr. Bittaker wins habeas relief in federal court and the state retries him -- a purely hypothetical

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[7] (...continued)
965 S.W.2d 913 (Mo. App. 1998) ([under the rationale in *Simmons*] "when a defendant testifies at a post conviction hearing in support of a motion alleging ineffective assistance of counsel where the defendant's testimony is indispensable in overcoming the heavy presumption of counsel's competence, trial counsel's testimony may not be admitted against the defendant at a subsequent trial to prove its incriminating content on the ultimate issue of guilt, unless the defendant makes no objection").

situation at the present time. There is currently no controversy regarding the admissibility of any particular piece of evidence in any court.

Additionally, the Warden has been unable to document that the protective order has caused any prejudice to her ability to litigate the habeas petition. The protective order envisions that the Warden may seek leave to provide protected material to anyone who she needs to help her litigate the habeas action, and the Warden has already taken advantage of those provisions. *See* Warden's Appendix at A-3 n.1 ("[d]isclosure of the contents of the documents and the documents themselves may [] be made . . . [with] an order from" the District Court) (see also footnote 1); and Respondent's Appendix C (Stipulation and Order Granting Warden Leave to Produce a Copy of Petitioner's Deposition Transcript to Mental Health Expert); *see also* Warden's Appendix at A-5 to A-6 & n.3.

The Warden's failure to demonstrate the existence of a dispositive conflict on the issue of the scope of an implied waiver of the attorney-client privilege in a federal habeas corpus proceeding justifies denial of certiorari. Moreover, resolution of the waiver issue by this Court would make no difference in either the Warden's ability to litigate Mr. Bittaker's claims, or the substantive outcome of the case.

CONCLUSION

The Warden's certiorari petition raises no worthy issues for review. The *Bittaker v. Woodford* decision appropriately applied long-established principles relating to civil discovery and the attorney-client privilege and the work product doctrine.

While the Warden alleges that the Court of Appeals' holding creates a conflict with the decisions of other Circuits that justifies certiorari, this contention lacks merit. This issue is irrelevant to the ultimate outcome of this case, since the en banc court's resolution of the protective order issue is sufficient to justify its denial of the Warden's requested relief on collateral appeal.

For all of these reasons, the Warden's Petition for Writ of Certiorari should be denied.

Dated: October 9, 2003

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

MARGO A. ROCCONI
Deputy Federal Public Defender

Counsel for Respondent

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON, Acting
Chief Assistant Attorney General
MARC E. TURCHIN, Acting
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General
A. SCOTT HAYWARD
Deputy Attorney General
State Bar No. 172106
300 South Spring Street
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Telephone: (213) 897-2370
Fax: (213) 897-2806
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. BITTAKER, Petitioner, **v.** **JEANNE WOODFORD, Warden of California State Prison at San Quentin, et al.,** Respondent.	CV 91 1643-WMB **NOTICE OF MOTION AND MOTION TO DISMISS ATTORNEY GENERAL BILL LOCKYER AS A PARTY TO THIS ACTION** Hearing: July 16, 2001 Time: 10:00 a.m. Courtroom: 9 Judge: Hon. Wm. Matthew Byrne, Jr.

TO PETITIONER AND TO HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on July 16, 2001, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9 of the United States District Court, located at 312 North Spring Street, Los Angeles, California, respondent will move the Honorable Wm. Matthew Byrne, Jr., Judge of the United States District Court, for an order dismissing the California Attorney General as a party to this action. This motion will be made on the ground that the Attorney General is not a proper party to this action, as he does

Appendix A

not maintain "custody" over petitioner.

This motion will be based on this notice, the attached memorandum of points and authorities, and those papers previously lodged with the Court and referenced in the pleadings, including the transcripts of record from petitioner's trial, the pleadings and other records on file herein, and such other and further argument and evidence as may be introduced at the hearing on the motion.[1/]

Dated: June 19, 2001

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON, Acting
Chief Assistant Attorney General

MARC E. TURCHIN, Acting
Senior Assistant Attorney General

DONALD E. DE NICOLA
Supervising Deputy Attorney General

A. Scott Hayward by KSB

A. SCOTT HAYWARD
Deputy Attorney General

Attorneys for Respondent

LA1991XW0003

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1. Pursuant to applicable rules, respondent noticed this motion for hearing. However, based on the subject matter addressed herein, respondent does not believe any hearing is necessary, and that the Court can rule on the motion based on the moving papers, and any opposition filed in response thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

THE CALIFORNIA ATTORNEY GENERAL IS NOT A PROPER PARTY TO THIS ACTION AND SHOULD THEREFORE BE DISMISSED AS A PARTY

In his original petition for writ of habeas corpus, petitioner named as respondents the warden of San Quentin (then Daniel Vasquez), as well as the Attorney General for the State of California (then Daniel Lungren). Because petitioner is in the custody of the warden of San Quentin Prison, but not the California Attorney General, the Attorney General should be dismissed as a party to this action.

A habeas corpus petitioner must name as respondent the person having custody of him. See generally Rule 2(a), 28 foll. U.S.C. § 2254; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894, (9th Cir. 1996); Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992). Typically, this person is "the warden of the facility in which the petitioner is incarcerated." Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

The Attorney General of the State of California is generally named as an additional respondent, in accordance with the mandates of Rule 2, subsections (b), of the Rules Governing Section 2254 Cases in the United States District Courts. 28 foll. U.S.C. § 2254 Rule 2(b). However, the purpose of naming the Attorney General concerns a situation where the petitioner will be subject to future custody, and the actual custodian is not presently known. Id. Under such circumstances, the Attorney

General is in the best position to inform the court who the proper party respondents are. Adv. Comm. Notes, Rule 2(b).[2/]

Rule 2(b) does not now, nor has it ever, applied to petitioner. Since being convicted, he has been incarcerated at San Quentin Prison, and in the custody of the warden of that penal institution. Petitioner improperly named the California Attorney General as a party to this action when he filed his original petition. The Attorney General does not hold petition in his custody and would not be the official who could comply with any grant of the writ. Thus, the Attorney General should be dismissed as a party from this case.

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2. "It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party." Adv. Comm. Notes, Rule 2(b), emphasis added.

CONCLUSION

Accordingly, respondent respectfully asks that the Attorney General of the State of California be dismissed as a party from this action.

Dated: June 19, 2001

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON, Acting
Chief Assistant Attorney General

MARC E. TURCHIN, Acting
Senior Assistant Attorney General

DONALD E. DE NICOLA
Supervising Deputy Attorney General

A. Scott Hayward (by KSB)

A. SCOTT HAYWARD
Deputy Attorney General

Attorneys for Respondent

LA1991XW0003

DECLARATION OF SERVICE

Case Name: **LAWRENCE S. BITTAKER v. JEANNE WOODFORD, WARDEN**

Case Nos.: **CV 91-1643-WMB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 19, 2001, I placed the attached

NOTICE OF MOTION AND MOTION TO DISMISS ATTORNEY GENERAL BILL LOCKYER AS A PART TO THIS ACTION

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

MARGO A. ROCCONI
DEPUTY FEDERAL PUBLIC DEFENDER
321 EAST SECOND STREET
LOS ANGELES, CA 90012-4206

C. RENEE MANES
DEPUTY FEDERAL PUBLIC DEFENDER
321 EAST SECOND STREET
LOS ANGELES, CA 90012-4206

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on June 19, 2001, at Los Angeles, California.

Edwina R Tenzay
Declarant

LA1991XW0003

FILED
CLERK, U.S. DISTRICT COURT

AUG 1 2001

CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. BITTAKER,

Petitioner,

v.

JEANNE WOODFORD, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 91-1643 WMB

DEATH PENALTY CASE

ORDER RE: RESPONDENT'S MOTION TO DISMISS ATTORNEY GENERAL BILL LOCKYER AS A PARTY TO THIS ACTION

Attorney General Bill Lockyer is hereby DISMISSED as a party to this action without prejudice. See Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

IT IS SO ORDERED.

Dated: August 1, 2001.

Wm. Matthew Byrne Jr.

WM. MATTHEW BYRNE, JR.
United States District Judge

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
CAROL F. JORSTAD
Deputy Attorney General
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300 South Spring Street
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Telephone: (213) 897-2370
Fax: (213) 897-2806
Attorneys for Respondent

FILED
CLERK, U.S. DISTRICT COURT
JUL 19 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. BITTAKER,

Petitioner,

v.

JEANNE WOODFORD, Warden of California State Prison at San Quentin,

Respondent.

CAPITAL CASE

CV 91-1643 WMB

STIPULATION AND ~~[PROPOSED]~~ ORDER GRANTING RESPONDENT LEAVE TO PRODUCE A COPY OF PETITIONER'S DEPOSITION TRANSCRIPT TO MENTAL HEALTH EXPERT

ENTERED ON ICMS
JUL 22 2002

DEATH PENALTY

WHEREAS, Petitioner has filed a Second Amended Petition for Writ of Habeas Corpus which alleges in Claim Two that he was incompetent to plead or be tried for capital murder in 1981;

WHEREAS, the parties agree that, by doing so, Petitioner has placed at issue his mental state during the time of his 1981 trial;

WHEREAS, Petitioner's alleged incompetence to plead or stand trial as set forth above was a subject of inquiry during Petitioner's May 30, 2002, deposition;

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Appendix C

THEREFORE, IT IS HEREBY STIPULATED by and between Petitioner Lawrence S. Bittaker, by and through his attorneys of record, and Respondent Jeanne Woodford, by and through the Attorney General of the State of California, as follows:

For purposes of defending against Claim Two in the Second Amended Petition for Writ of Habeas Corpus, Respondent may produce a copy of Petitioner's May 30, 2002, deposition transcript to a mental health expert who is assisting Respondent in that regard. The mental health expert will be provided with a copy of the May 10, 2002, protective order, which makes confidential said deposition transcript, and will be instructed by counsel for

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Respondent to use said transcript only in a manner consistent with the terms of the protective order.

Respectfully Submitted,

DATED: July 16, 2002

BILL LOCKYER
Attorney General of the State of California
ROBERT R ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
CAROL F. JORSTAD
Deputy Attorney General

A. SCOTT HAYWARD,
Deputy Attorney General

Attorneys for Respondent

DATED: July 16, 2002

MARIA E. STRATTON
Federal Public Defender
C. RENEE MANES
MARGO ROCCONI
DEAN GITZ
Deputy Federal Public Defenders

By: C Renee Manes
C. RENEE MANES
* By A. Scott Hayward
Attorneys for Petitioner

IT IS SO ORDERED.

DATED: July 19, 2002.

/s/ Matthew Byrne
HON. WM. MATTHEW BYRNE, JR.
UNITED STATES MAGISTRATE JUDGE

* Pursuant to Ms. Manes's telephone authorization.

DECLARATION OF SERVICE

Case Name: **LAWRENCE S. BITTAKER v. JEANNE WOODFORD, WARDEN**

Case Nos.: **CV 91-1643-WMB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 17, 2002, I placed the attached

STIPULATION AND [PROPOSED] ORDER GRANTING RESPONDENT LEAVE TO PRODUCE A COPY OF PETITIONER'S DEPOSITION TRANSCRIPT TO MENTAL HEALTH EXPERT

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

MARGO A. ROCONNI
C. RENEE MANES
DEAN GITS
DEPUTY FEDERAL PUBLIC DEFENDERS
321 EAST SECOND STREET
LOS ANGELES, CA 90012-4206

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on July 17, 2002, at Los Angeles, California.

Edwina R. Fuyay
Declarant

LA1991XW0003